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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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UNITED STATES OF AMERICA, :

Plaintiff, : Criminal Action No.

v. : 1:16-cr-10094-LTS

ROSS MCLELLAN, :

Defendant. :

----- x

BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE

CHARGE CONFERENCE

Friday, June 22, 2018
9:37 a.m.

John J. Moakley United States Courthouse
Courtroom No. 13
One Courthouse Way
Boston, Massachusetts

Rachel M. Lopez, CRR
Official Court Reporter
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P R O C E E D I N G S

(In open court.)

THE DEPUTY CLERK: The United States District Court for the District of Massachusetts is now in session, the Honorable Leo T. Sorokin presiding.

Today is June 22nd, the case of United States vs. Ross McLellan, criminal action 16-10094 will now appear before this court.

Counsel, please identify themselves for the record.

THE COURT: I see all counsel.

And you waived Mr. McLellan's presence?

MR. WEINBERG: Yes.

THE COURT: All right. Okay. I have the Government's filing. I have gone through that. That's why I'm a little bit late. I apologize for that. And so why don't we just go through that first and then I'll hear from whatever -- I'll hear both your views on theirs and then I'll hear whatever you have.

MR. WEINBERG: Thank you, Your Honor.

THE COURT: All right. So what's your view, Mr. Weinberg, on whether I should have willful blindness?

MR. WEINBERG: I think it's the antithesis of the Government's theory of prosecution, which is this -- Mr. McLellan directed Mr. Pennings and Mr. Boomgaardt, caused Mr. Pennings and Boomgaardt to commit these frauds with

1 clients. You can't direct somebody while you're willfully
2 blind. There's an essential contradiction between the
3 Government theory, the facts in the case, their arguments,
4 that -- what I expect to be Mr. Johnston and Mr. Frank's
5 arguments, in a willful blindness charge.

6 Willful blindness is an alternative theory of
7 knowledge that is not to be instructed in cases where the
8 Government's theory is actual knowledge. And I submit that
9 there is simply no evidence that Mr. McLellan was blinded to
10 red flags and avoided knowing something. The paradigm is
11 the, you know, the person -- somebody gives them a suitcase
12 at the border and says, I'm going to give you five grand on
13 the other side and they walk the suitcase over without
14 opening it up. That's where willful blindness comes from.
15 This is the antithesis of that.

16 THE COURT: Okay. I'm going to think about the
17 willful blindness. I -- I'm happy to hear if you have more
18 to say, but you --

19 MR. FRANK: Only that -- I mean, we've cited it,
20 Judge. The case law is crystal clear that the willful
21 blindness theory is -- can co-exist with the theory of actual
22 knowledge, where the defense argues that he relied on the
23 wrong guy, when he gets an e-mail saying we have to charge a
24 fee, otherwise they get suspicious. That's the
25 quintessential red flag and he goes ahead with the

1 transaction and he instructs the traders to apply undisclosed
2 markups. So the defense is the one that's advancing this
3 theory and there's easily evidence from which a jury can
4 infer that he was blind to those red flags and deliberately
5 avoided looking into them.

6 MR. WEINBERG: And one suggestion, Your Honor, is
7 wait until the final arguments. I don't intend to argue that
8 Mr. McLellan was willfully blind. I intend to argue that he
9 never directed Mr. Pennings to do certain things that the
10 Government claims he did and that Pennings and Boomgaardt are
11 committing -- are lying to the extent that they're blaming
12 McLellan for it.

13 MR. FRANK: He's already -- Judge, I understand
14 that he's not arguing that he was willfully blind, but he's
15 opened the door to it, he argued it in opening, that he
16 relied on the wrong guy.

17 MR. WEINBERG: That's not being willfully blind.
18 You need more than reliance. You need --

19 THE COURT: I got it. I'll think about it. I'm
20 disinclined to wait, because I think it's fair for both of
21 you to know what law I'm going to instruct on before you
22 close. So I'll -- I think I'll resolve it before, one way or
23 the other, so you know.

24 MR. WEINBERG: Well, I would respectfully --

25 THE COURT: I understand if I resolve it the way

1 the Government wants, you object. You think it's not
2 applicable and not warranted in this case.

3 MR. WEINBERG: It's even more than that. I believe
4 the Government thereafter should not be able to argue that
5 Mr. McLellan knowingly directed Mr. Pennings and
6 Mr. Boomgaardt. It's inconsistent with willful blindness.
7 They have to make a choice. Either he was knowledgeable and
8 engaged and directed and led an alleged conspiracy, or he was
9 willfully blind and not educating themselves as to what
10 Mr. Pennings was doing. They can't be arguing alternative
11 theories when their real argument has been only one of those
12 two theories.

13 MR. FRANK: Unfortunately, the First Circuit says
14 we can.

15 MR. WEINBERG: The First Circuit says that if
16 there's a factual predicate, the Court has discretion to
17 issue a willful blindness instruction, not that it must.

18 THE COURT: All right. I got it.

19 The second -- what's your position, Mr. Weinberg,
20 on the modification that the Government proposes on page 28?
21 Which is with respect to essentially just modifying the
22 sentence at the top -- top of page 28, to say -- add the
23 phrase, "on fixed income securities when trading as a
24 principal or riskless principal."

25 MR. WEINBERG: I would object to the Government's

1 modification of that instruction, Your Honor.

2 THE COURT: Why?

3 MR. WEINBERG: Because it's unnecessary. There's
4 been no allegation here that there was any failure to
5 disclose an equity on a -- in other words, the
6 confirmations -- this Government is not putting confirmations
7 where there was a failure to disclose an equity trade. This
8 is purely a concept that relates to the fixed income trades,
9 but I see no reason for the Court to, you know, complicate
10 the clarity of its instruction by limiting it.

11 MR. FRANK: Your Honor --

12 THE COURT: Okay. You mean, as a general matter,
13 this already only applies to fixed income.

14 MR. WEINBERG: Yes.

15 THE COURT: But what about the equity transaction
16 on the Russell 2000? That was an equity, not a fixed income.

17 MR. FRANK: Well, and it also does apply to fixed
18 income, Your Honor, where fixed income is traded as agent.

19 MR. WEINBERG: You know, I think Your Honor is
20 right, there is the ETF and the breakdown of the ETF. So I
21 mean, I'd prefer it being as it is, but I can't strongly
22 argue that it shouldn't be limited to the fixed income, which
23 is --

24 THE COURT: All right. I think I'll modify.

25 MR. FRANK: I'm sorry, I didn't quite understand.

1 THE COURT: I think I'll modify it.

2 MR. FRANK: So Your Honor, are you going to add
3 that exact phrase "on fixed income when trading is principal
4 or riskless principal."?

5 MR. WEINBERG: That I object to.

6 THE COURT: What do you want me to say?

7 MR. WEINBERG: Just there's no general duty on
8 fixed income to -- Your Honor has already said no general
9 legal duty to disclose on fixed income.

10 MR. FRANK: But that's -- that's an incorrect
11 statement of the law.

12 THE COURT: What do you say about that,
13 Mr. Weinberg?

14 MR. WEINBERG: Well, I guess what I say about that.

15 THE COURT: Here's what I'm trying to address here.
16 The Government's position throughout the case has been this
17 is not an omissions case. I don't agree with -- you may
18 object to this, but I haven't -- as you can see in the
19 instruction, agreed to limit the instruction to just saying
20 affirmative misrepresentations. But given the nature of
21 the -- because I do think that this sort of half-truths
22 theory is fairly in. But the Government has never suggested,
23 up to now, at any point in the case, that Mr. McLellan could
24 be guilty merely for being silent.

25 Like the reason -- to the extent there's something

1 not said that matters, it matters because there were things
2 that were said that conveyed an impression that either were
3 affirmatively untrue or were misstatements. But this is --
4 you haven't proceeded on a theory that -- that just doing
5 this, in and of itself, without the statements, is illegal.

6 MR. FRANK: That's exactly right, Your Honor, but
7 there's one important nuance to that, which is that we have
8 proceeded on a theory that they affirmatively told the
9 clients they were acting as agent. And so to an agents --
10 their own experts testify that agents do have duties of
11 disclosure. So while we're not proceeding on a failure to
12 disclose case, we are proceeding -- in the presence of a
13 duty, we are proceeding on an affirmative misstatements case.
14 And where they affirmatively told clients we are acting as
15 your agent, if the Court chooses to put in a statement of
16 what the -- what the law is --

17 THE COURT: But then there's no general legal
18 duty -- the reason -- even on that theory you're describing,
19 the duty to disclose arises because of what they said.

20 MR. FRANK: Correct.

21 THE COURT: Not because they had some independent
22 duty to disclose.

23 MR. FRANK: Exactly right. But if you're going to
24 put in the law with respect to duties to disclose, agents do
25 have duties to disclose. So they are -- by calling

1 themselves agents, it would just be misleading to tell the
2 jury that --

3 THE COURT: No, no. People who are legally agents
4 might have duties to disclose, but calling oneself an agent
5 doesn't necessarily establish -- somebody in the audience
6 could say I'm a lawyer. Lawyers have duties, but calling
7 themselves a lawyer doesn't make them a lawyer.

8 MR. FRANK: You're right.

9 THE COURT: That's the difference. So the concern
10 I have here is that given there are, essentially, undisputed
11 charges that weren't expressly disclosed to the client. Like
12 I don't think Mr. Weinberg -- there's any argument that some
13 of these fees were charged right. No one is suggesting they
14 were actually listed on a bill to the clients. That the jury
15 would infer that that's -- there was some requirement to tell
16 them. Any requirement to tell them arises out of things they
17 said to them that were lies and this was -- right?

18 MR. FRANK: Stipulated. Two points. One is, when
19 they told clients they were agents, that gave rise to an
20 understanding on the part of the clients. So if the Court is
21 going to instruct the jury on the duties to disclose, we
22 think it needs to be a complete instruction.

23 THE COURT: All I want -- what I'm trying to say
24 here and all I want to say to the jury here is, at the
25 get-go, they had no duty to disclose. This is a lies, half

1 lies, fraud, deceit, the different theories case. Like what
2 they did isn't illegal, without the statements. Right? It's
3 the statements that make this illegal, at least on the
4 presentation and theory of the --

5 MR. FRANK: Correct. But my only quibble is that
6 where they say they are an agent, I think the jury needs a
7 complete understanding of what the law is with respect to
8 agents and riskless principals. Because by calling
9 themselves agents, they're giving rise to an understanding.
10 So if we're going to say the law doesn't say X about riskless
11 principals --

12 THE COURT: I'm not -- but I'm actually thinking
13 that I shouldn't say anything about riskless principals. I'm
14 not trying to instruct them on all of the laws of agents. I
15 just want them to understand that at the beginning of this
16 whole process, there was no general duty to disclose. Given
17 what they said, they could've -- there's no -- you know, that
18 doesn't permit them to lie, necessarily, but -- or probably
19 not at all.

20 But I'm not trying to describe to them -- and
21 saying they're agents then gets into the question of whether
22 they were -- whether they were actually agents or whether
23 they just said they were agents and what they intended. And
24 that's like no different, in a sense, than what you're
25 describing as saying we're only charging a management fee and

1 we're not charging a commission.

2 MR. WEINBERG: It's also going to have the Court
3 weigh in on just -- in what context they represented they
4 were agents. Our argument, Mr. Frank argues that the word
5 "agent" somehow imposes all these additional
6 responsibilities. We argue the word "agent" is an accurate
7 description in the marketplace.

8 THE COURT: But you're arguing that those
9 responsibilities are coming in because of what people
10 understood from it.

11 MR. FRANK: And what they said.

12 THE COURT: And what they understood is from what
13 the defendant said.

14 MR. FRANK: Correct.

15 THE COURT: And not because of some independent
16 legal status. In other words, you're not invoking there's
17 Rule 42 and it says that as a result of this status. This is
18 a case that -- in which you're arguing they said things and
19 as a result of what they said, they duped people. And as a
20 result of what they said, part of what they duped was it
21 invoked different understandings.

22 MR. FRANK: But that's exactly right. And so if
23 the Court is going to instruct the jury on what the baseline
24 understandings are in terms of the duties of riskless
25 principals, then it should also --

1 THE COURT: I don't think I should instruct them on
2 all the baseline understanding of all these things. What I'm
3 trying to just instruct them is that there's no, at the
4 outset, duty -- the fact that there's a charge that's not
5 revealed to a client, is -- there's no automatic duty to
6 disclose that.

7 MR. FRANK: But that is only true with respect to
8 fixed income that is traded as riskless principal or
9 principal. It is not true with respect to riskless principal
10 traded as agent, where there is a duty. So I think the best
11 course here is for the Court to remain silent on all of that,
12 because that's not core to the securities fraud charge. But
13 if the Court -- I understand what the Court is trying to do,
14 and so I'm just saying if we're going to wade into that sort
15 of concern --

16 THE COURT: The concern I have is that the jury
17 will look at this and say they didn't tell them what the
18 commissions are and that's wrong and that's already --
19 they're already two-thirds of the way to being convicted and
20 that would be wrong, if they came to that conclusion on that
21 fact alone. And so that's the concern that I have.

22 MR. FRANK: But if the Court is going to wade into
23 this, the statement of the law has to be correct and there is
24 a general legal duty for agents to disclose both equities and
25 fixed income commissions.

1 THE COURT: But isn't the question as to what --
2 isn't one of the question -- factual questions of his whether
3 they were agents. In other words, the question of agent
4 could mean different things.

5 MR. FRANK: Stipulated, but it is not a correct
6 statement of the law that there is no general legal duty to
7 disclose commissions on fixed income trades. That's only
8 true where they're traded in a particular capacity. That's
9 why I think it's better to remain silent. But if we're --
10 it's a metaphor for the case. If the Court is going to speak
11 on this issue, I think it has to be a complete statement
12 of --

13 MR. WEINBERG: The problem is that the whole agency
14 theory, Your Honor, when you look at the representations that
15 are made in these documents, we will go and act as your agent
16 in the marketplace. The broker-dealer will act as an agent.
17 It's not the agent as the fiduciary that suddenly dilutes the
18 requirements. It's the marketplace. And you've heard
19 uncontradicted evidence that State Street Global Markets, the
20 broker-dealer, acted as an agent in the marketplace. That
21 doesn't -- they can be an agent and a riskless principal at
22 the same time.

23 MR. FRANK: That's a defense argument, I get that.

24 MR. WEINBERG: It's not the defense argument. It's
25 the uncontradicted evidence in this case. So by limiting

1 this --

2 THE COURT: I'm going to think about this sentence.
3 I understand what you're both saying. Let me think about it.

4 MR. WEINBERG: I would also say, Your Honor, it's
5 in the context, so I want to reserve my objections to going
6 beyond the Government's affirmative misrepresentation theory,
7 which they've said on several occasions this is about lies,
8 this is about affirmative misrepresentations. They've done
9 it in pleadings, they did it on June 12 in statements to the
10 Court. This is not an omissions case.

11 Your Honor has weighted it, you know, to our
12 perspective, at least, broadly in favor of broadening the
13 theories of liability beyond what an affirmative
14 misrepresentation, beyond a lie. This balances it somewhat.
15 It's still troubling and we object to allowing them omissions
16 that mislead, on concealment, on, you know, half-truths. You
17 know, all of the different options to predicating this case
18 and what the Government said this case was about, affirmative
19 misrepresentations, lies.

20 THE COURT: So just so you understand why, I
21 don't -- to the extent -- partly, you argued it sort of
22 estoppel theory.

23 MR. WEINBERG: Yes.

24 THE COURT: Right. And I'm not persuaded that the
25 course of this case gives rise to the kind of estoppel -- I'm

1 not persuaded that the course of this case gives rise to the
2 estoppel that you seek to invoke. And that --

3 I do think that the Government has said this is a
4 lies case and -- but I don't think that they have described
5 it in a way, either in their pleadings or in the evidence,
6 that in some way limits it -- that would limit it such that,
7 say, on page 26, where I'm describing the first element, that
8 I should limit the first element to make an untrue statement
9 of material fact and not include the other parts. I think
10 that the other parts, the other ways of doing that that are
11 described there, are fair on this evidence, and I do think
12 that part of the reason that I want to have -- put this
13 sentence in was because I want it clear to the jury that this
14 is not a just mere -- not mere, but just an omissions case.
15 And the Government's candid. It's not arguing that it is.
16 And so I want to think about how to put that in.

17 MR. FRANK: Just one further thought on that, if I
18 may, Your Honor. We think in order to be fully complete, the
19 Court should instruct the jury that they may consider the
20 representations that the defendant and his alleged
21 co-conspirators made with respect to the capacity in which
22 they were trading as evidence of their intent.

23 THE COURT: I'll think about that. Okay.

24 Next, the -- about interstate fraud, which is
25 page 32. Essentially, the Government objects to the two

1 sentences at the end of the carryover paragraph on the top of
2 page 32 and I was thinking about deleting the first sentence
3 the Government objects to, the one that begins "facts
4 relevant," but leaving in the second sentence, because that
5 seems like that might be helpful and it seems to resolve the
6 concern that's raised by the Government.

7 Do you have a view on that, Mr. Weinberg?

8 MR. WEINBERG: You know, my view on that,
9 generally, Your Honor, is that Your Honor could affirmatively
10 instruct the jury, as we have requested in our
11 extraterritoriality instruction on securities fraud. You
12 know, that's really our request, that Your Honor require the
13 jury, as -- in order to find that this is a United States
14 crime, it made the request -- if I can find it -- request
15 number 10, in the middle paragraph in particular.

16 MR. FRANK: Can I see that, Marty?

17 THE COURT: Well, Mr. Frank, if I'm going to tell
18 them, which I think I should, that securities transactions
19 conducted by US-based agent on behalf of a foreign buyer or
20 seller can still occur in the United States, which is
21 correct, even if title originates from abroad or is
22 ultimately transferred abroad at the end of the transaction,
23 I should give them some guidance -- maybe I should, as to how
24 they figure that out. Why not just say you may consider, but
25 are not limited to considering, where the purchase or sale

1 agreement, and so forth.

2 MR. FRANK: Well -- may I have a moment, Your
3 Honor?

4 THE COURT: Yes.

5 (Counsel confers.)

6 MR. FRANK: There's a couple of issues, Your Honor.
7 One is, one of the factors is where title passes, and where
8 title passes is itself sufficient, as the prior sentence
9 suggests.

10 THE COURT: Right.

11 MR. FRANK: For us to meet our burden. But the
12 other point is, this multifactor test, which as we point out,
13 really relates to sort of peculiar securities that are not
14 the kinds of securities we are talking about in this case,
15 suggests that we have to meet this sort of very high hurdle
16 and establish all of these factors and we don't. There's
17 been uncontradicted testimony in this case that these US
18 securities, which were traded in the United States by a US
19 broker-dealer cleared and settled in the United States.

20 And what that means is that the securities were
21 transferred from seller to buyer in the United States and the
22 money was transferred from buyer to seller in the United
23 States. That's all -- that's all we have to show. And you
24 know, suggesting all these different factors is going to --
25 we think, confuse the jury and sort of raise the burden that

1 we have to meet.

2 MR. WEINBERG: One is, it may have been
3 uncontradicted, but it wasn't particularly compelling, given
4 the fact that the only witness that addressed this had not
5 worked at State Street and could not testify with any
6 certainty as to the protocols and procedures used by State
7 Street in 2010 or 2011.

8 MR. FRANK: I will stipulate that he was not the
9 world's most compelling witness, but he was very clear on the
10 practices of clearing and settlement even in 2010 and 2011,
11 and that's independent of what happened in State Street's
12 back office.

13 THE COURT: All right. What if I said, maybe to
14 clarify, really, that after the one and two, is sort of an
15 explanation, in a sense, if you don't have one and two,
16 right? If it is -- it occurs in the US if there's
17 irrevocable liability and it occurs in the US if title
18 passes. But really, even if you don't have one of those two
19 things, you can still have a securities transaction in the
20 United States.

21 That is, for this case, even if it was a US-based
22 agent in the form of buyer or seller with title originating
23 abroad, or being ultimately abroad, it could, and then you
24 would think about these other things. That's really what it
25 is. You think about these things when you don't have the one

1 or two.

2 MR. WEINBERG: Right.

3 THE COURT: So maybe if I just clarify that, that
4 would resolve -- and then where entitled to securities would
5 pass would matter, because that would be a thing you would
6 think about. And that's really -- maybe it's just not clear.

7 MR. WEINBERG: I'm not sure that I agree with that,
8 Your Honor. I think you need one or two to establish a
9 security fraud in America, given the context of this case,
10 where contracts were formed outside of America. I think the
11 Government is seeking an exception to the locus of almost all
12 of the securities activity.

13 THE COURT: Do you want me to just eliminate
14 everything after?

15 MR. WEINBERG: No, I think Your Honor should --

16 THE COURT: Well, but if the seller incurred -- if
17 it's one or two, it's in the US, right? If it's not one or
18 two, aren't we just done?

19 MR. WEINBERG: Because I think the facts relevant
20 to the determination, the jury doesn't know what an
21 irrevocable liability in America is, or title, I don't think
22 the Government has clearly -- you establish that by
23 undisputed evidence given the weakness of the evidence that
24 was alone offered on that. And I think Your Honor could
25 certainly --

1 THE COURT: So you're saying all these things
2 really mean -- if, in order to determine -- in thinking about
3 irrevocable liability, you may consider all these factors.

4 MR. WEINBERG: Yes. And I go back to my request
5 10, which really informs the jury that Mr. McLellan's
6 location in the United States is not dispositive. And you
7 know, addresses certain of the elements that we think are
8 applicable from the largely Second Circuit law that sets out
9 the relationship, you know, under *Morrison* and securities
10 cases.

11 MR. FRANK: Your Honor, these are indisputably
12 standard US securities. They're US Treasuries. They only
13 trade in the United States. They're corporate bonds of major
14 United States companies that only trade in the United States.

15 This is suggesting some very high hurdle that
16 applies to like PIPE offerings and various bizarre forms of
17 securities that are just not applicable here.

18 THE COURT: I think it -- I assume it goes, in some
19 sense, what purchase are we talking about, or what sale are
20 we talking about.

21 MR. FRANK: By State Street Global Markets, LLC, a
22 US-based broker-dealer.

23 THE COURT: All right. Let me think about all
24 that. I understand both -- I understand that issue better
25 now and it's helpful.

1 As to the -- then the Government had a number of
2 more smaller issues.

3 MR. FRANK: Of those, there's one that I wish to
4 highlight, Your Honor. Some of them are quite small.

5 THE COURT: All right.

6 MR. FRANK: But the issue about sharp dealing or
7 unethical conduct, we have a very serious concern about.

8 THE COURT: Okay.

9 MR. FRANK: Breach of contract alone --

10 THE COURT: Hold on, let me just find where that --

11 MR. FRANK: That's at the bottom of page 6 and the
12 top of page 7 of our filing.

13 THE COURT: Okay. Thank you. Go ahead.

14 MR. FRANK: Breach of contract alone is not fraud,
15 but breach of contract where you never intended to uphold the
16 contract is fraud, and breach of contract certainly can be
17 evidence of fraud. And sharp dealing and unethical conduct
18 are vague and undefined terms that, by the way, also can be
19 evidence of fraud. But I'm not sure that anyone really knows
20 what sharp dealing and unethical conduct actually are, but
21 they certainly can be consistent with fraud. So again, we
22 think that this is a nonstandard instruction that really
23 could have -- could have the --

24 THE COURT: I won't be insulted, you can say
25 whatever you want. You won't offend me.

1 MR. FRANK: -- could have the unintended
2 consequence of --

3 THE COURT: Other people have said much worse about
4 me. Some of them are in your office, even. So it won't
5 bother -- it doesn't bother me. I don't take it personally.

6 MR. FRANK: I disavow, whatever they said.

7 THE COURT: I know Mr. Lelling is here. I don't
8 know if he disavows everything they said.

9 MR. FRANK: Could have the unintended consequence
10 of having a defense -- an affirmative defense come out of the
11 Court's mouth and we think that's dangerous and we think a
12 standard instruction is more appropriate. Contracts are
13 issued in tons of fraud cases and yet this instruction isn't
14 typically given. But if it is given, we think that it
15 should -- we should take out the ambiguity about sharp
16 dealing and unethical conduct and also make clear to the jury
17 that breach of contract, while alone is not enough, can be
18 evidence of fraud.

19 MR. WEINBERG: Your Honor has said here that these
20 three terms, without further evidence of fraudulent intent,
21 do not amount to a scheme to defraud. One of our concerns,
22 Your Honor, is that so much of this case -- and I'll just
23 focus on a specific standalone count, which is Count 5, where
24 the word "inadvertent" -- which is not an e-mail sent to a
25 client to try to get money from a client, it's an e-mail sent

1 to a client, according to the Government's theory, to try to
2 conceal certain facts. It's charged as a standalone wire
3 fraud.

4 The Government -- Your Honor has talked about
5 reckless disregard here. Your Honor has given multiple
6 theories of what constitutes a false statement. We need some
7 balance, so the jury understands that this is not strict
8 liability, that it doesn't -- every business communication,
9 that it's not 100 percent accurate is not a fraudulent
10 statement.

11 And this allows the jury to look at things that may
12 be edgy business conduct and see the -- that they need more
13 than just simply a partially inaccurate statement before they
14 convict somebody of securities or wire fraud. So we think
15 this concept is extremely important in terms of balancing the
16 other portions of Your Honor's instructions on these two
17 criminal offenses.

18 MR. FRANK: We think there's tons of balance in
19 here, including multiple good faith instructions.

20 THE COURT: Okay.

21 MR. FRANK: I'm pleased, though, that counsel at
22 least acknowledges that the conduct is at least edgy.

23 MR. WEINBERG: That I do. Mr. Pennings' and
24 Boomgaardt's conduct, in order to be more specific.

25 THE COURT: All right. I have one question

1 about -- Mr. Weinberg, I am -- I think I agree with the
2 Government about page 34, adding in the word "or entity."

3 MR. WEINBERG: Yes. Understood.

4 THE COURT: Okay. And on page 23 -- sorry.

5 I thought I would change the top -- the first line
6 to read -- it reads this way now, "A conspiracy is an
7 agreement, spoken or unspoken," I would then add "express or
8 tacit, among two or more conspirators." I think that is --
9 it's similar but -- to what's already there, but adding it, I
10 think, is helpful. I think the silent is covered by
11 unspoken. So I'm inclined to add that.

12 MR. WEINBERG: And I don't prefer it, obviously,
13 but I can't contend that that's in violation of the First
14 Circuit law on conspiracy.

15 THE COURT: Fine.

16 All right. What do you have?

17 MR. WEINBERG: I've got, unfortunately, Judge, a
18 number of points.

19 THE COURT: By the way, any issues with the verdict
20 slip before I turn to the defense?

21 MR. FRANK: None, Your Honor, and I assume that
22 you're going to take under advisement, or have you made a
23 decision on the other --

24 THE COURT: I think the others I'm going to take
25 under advisement. I'm going to issue something. You'll get

1 it all today. I think -- the breach of contract one, I'm
2 puzzling over. I'm thinking about -- I understand the
3 different issues. And so I'm not trying to inject an
4 affirmative defense into the case. I want to think about
5 that and think about how to put it in -- so let me -- I'll
6 puzzle over that and issue something. And the others, most
7 of the others I'm disinclined to do, the ones on your
8 section 4.

9 MR. WEINBERG: I'm trying to do this kind of
10 sequentially with Your Honor's instructions.

11 THE COURT: Sure.

12 MR. WEINBERG: Page 22, if I can start there.

13 THE COURT: Yes.

14 MR. WEINBERG: You have here at least six of State
15 Street's transition management clients. I think, given the
16 evidence Your Honor can eliminate the "at least," because the
17 testimony was focused on six.

18 THE COURT: Do you have a view about that?

19 MR. FRANK: The conspiracy was to defraud
20 elephant -- clients in elephant deals as the opportunities
21 came up. That's why the "at least" is in there. We haven't
22 introduced evidence of others that they actually defrauded,
23 but we have introduced evidence that the conspiracy was not
24 limited to those.

25 THE COURT: I think I'm inclined to leave it. I'll

1 tell you why. The reason I've described the -- I'm not going
2 to give the jury the indictment, because it's not evidence.
3 So I thought they -- but they have to find that the agreement
4 that's alleged in the indictment, this is the agreement
5 alleged in the indictment, so that's overruled.

6 MR. WEINBERG: The last paragraph, page 22, Your
7 Honor, talks about committing offenses on, in, or about
8 certain specific dates. I don't quarrel with that as being
9 an appropriate explanation of the conspiracy dates, but when
10 it comes to wire fraud, where there are three counts,
11 Counts 4 to 6, allege a specific wire described as being sent
12 on a specific date, I would ask Your Honor to -- in other
13 words, limit this instruction on on or about to Counts 1
14 through 3.

15 THE COURT: So suppose they determine that the
16 April 6th e-mail -- I think one of the e-mails is April 6th
17 on one of the counts.

18 MR. FRANK: I don't recall, Your Honor.

19 THE COURT: But -- whatever. Let's just say it's
20 April 6th. Suppose the jury believed that all the elements
21 of that fraud charge were met. They believed that the e-mail
22 was sent, they believed that it had the sufficient nexus to
23 the fraud, but they believed it was an April 5th e-mail. You
24 think that's an acquittal?

25 MR. WEINBERG: No, but I don't think -- if there

1 was evidence that would provide a reasoned basis for them to
2 adopt the hypothesis the Court just communicated. Here,
3 there's no disputed evidence regarding the date. There's an
4 e-mail. Nobody has argued the dates were wrong. We may have
5 not agreed on time, but these were e-mails --

6 THE COURT: "May" seems like an understatement.

7 MR. WEINBERG: Huh?

8 THE COURT: "May" seems like an understatement in
9 characterizing the respective views of all of you on the
10 timing.

11 MR. WEINBERG: We have, for instance, the AXA
12 Count 6, February 24th, there's a pre-trade sent. The date
13 is important.

14 THE COURT: I'm sorry, say this again?

15 MR. WEINBERG: On the Count 6, for instance,
16 there's a specific e-mail that attaches a pre-trade to AXA.
17 The Government is alleging that that's a wire fraud. On
18 Counts 4 and 5, they have specific e-mails. There's no
19 dispute about the dates. I don't want the jury to be able to
20 take a wire fraud count that's predicated on a specific
21 transmission and somehow bring other evidence in.

22 The AXA case is classic. We have a very strong
23 argument, we made it to the Court on a Rule 29 that there's
24 not even any evidence that a scheme to defraud -- even under
25 the Government's theory, of conflicting commissions that one

1 was stated and another one charged. There's no evidence as
2 to whether or not that was created, thought about, much less
3 that there's any evidence as of February 24th. So the dates
4 are important and they're not disputed. What I don't want to
5 do is substitute a generic scheme to defraud into a specific
6 wire count.

7 THE COURT: But doesn't this instruction just mean
8 on February -- like if they were to view the e-mail -- take
9 AXA, as other than February 24th, they're not -- if they
10 believed that the evidence indicates that, in fact, it was on
11 another date. That is, that the e-mail was sent on another
12 date, they could -- if they thought the e-mail was sent on
13 February 25th or 23rd, they -- or what have you, they
14 could -- they're not confined by the February 24th
15 allegation.

16 MR. WEINBERG: I don't disagree with Your Honor
17 philosophically or generically. I do disagree in the context
18 of this case, where there is such specificity to specific
19 wires, that -- it's not like we have a telephone call that a
20 witness said was made on March 7th. Sure.

21 THE COURT: What you're saying is that there will
22 be -- that the jury could do that. It's just that there is
23 no evidence in this record that would authorize the jury to
24 do that. And if they did that, came to the conclusion that
25 it was some other date and then made their evaluation about

1 nexus, based on that other date, that would be wrong, because
2 there's no basis to conclude it's any date other than the
3 date listed on the e-mail?

4 MR. WEINBERG: Yes. And it starts inviting
5 slippage into other e-mails or into a broader theory of
6 criminal liability than that alleged.

7 THE COURT: What do you think about that?

8 MR. FRANK: I don't think it does that. The Court
9 is very clear, it doesn't matter if the indictment charges
10 that a specific act occurred in or around a certain date.
11 And the evidence indicates that, in fact, it, in other words,
12 that act, was on another date. That's a very standard
13 proposition of the law. This is what we charged in the
14 indictment.

15 THE COURT: I think I'm going to leave it.
16 Next.

17 MR. WEINBERG: Page 23. I would ask that the Court
18 limit the object of the agreement to the specific crimes
19 alleged in Counts 2 through 5. And I say that --

20 THE COURT: Where are you?

21 MR. WEINBERG: The middle paragraph, Your Honor.
22 And I think we --

23 THE COURT: Not just securities fraud or wire
24 fraud, but the specific securities or wire fraud listed in
25 Counts 3 to 5.

1 MR. WEINBERG: Counts 2 to 5 in particular, because
2 Count 6, AXA is not within the ambit of the Count 1
3 conspiracy.

4 THE COURT: But you're not arguing that he was in a
5 conspiracy with Boomgaardt or Pennings about 6. I mean,
6 that's not --

7 MR. FRANK: We're explicitly arguing the opposite,
8 Your Honor.

9 THE COURT: Right. Yeah. I don't think that's
10 necessary. Next.

11 MR. WEINBERG: Page 23, I would ask for special
12 verdicts. Your Honor could give them an unanimity
13 instruction on whether they agree that it's securities fraud
14 or wire fraud, I would ask that there be a special verdict
15 added to the Count 1 verdict form.

16 THE COURT: So you want me add -- you want me to
17 break it out -- you want a special finding as to the object?

18 MR. WEINBERG: Yes.

19 THE COURT: So phrased how? So right now it's just
20 we the jury -- being unanimous, have reached the following
21 verdicts, not guilty or guilty on conspiracy.

22 MR. WEINBERG: I think it's just on the verdict
23 form. Your Honor has given them the proper unanimity
24 instruction.

25 THE COURT: Right, but on the verdict form, what

1 specifically --- how would I phrase it?

2 MR. WEINBERG: Do you unanimously agree? If you
3 unanimously --

4 THE COURT: In other words, we the jury --

5 MR. WEINBERG: -- unanimously agree that the --

6 THE COURT: Would it be a sub-part question?

7 MR. WEINBERG: Yes. Under Count 1.

8 THE COURT: Essentially, question one -- actually,
9 the one change that I'm going to make to the verdict form,
10 just as I look at it now, is non-substantive. I'm going to
11 number. So there will be a one, before Count 1, two, because
12 I refer to them in the instructions as numbered questions.
13 So I'm just going to number them. So what you're saying is
14 question one is the conspiracy question. Are you saying that
15 if they find -- if guilty?

16 MR. WEINBERG: Yes.

17 THE COURT: Then answer question 1a?

18 MR. WEINBERG: Yes.

19 THE COURT: And that would be do you unanimously
20 find that wire fraud --

21 MR. WEINBERG: The object of the conspiracy.

22 THE COURT: The object of the conspiracy was wire
23 fraud. And then under wire fraud, unanimously find wire
24 fraud and securities fraud, and they could -- and then it
25 would be yes or no as to each of those and they could check

1 that?

2 MR. WEINBERG: Yes.

3 THE COURT: What do you think about that?

4 MR. FRANK: I'm just a little concerned that that
5 invites sort of a multiple conspiracy confusion. The Court
6 is very clear. You have to agree what he was trying to do
7 here, what the object of the conspiracy was. But to break it
8 out on the verdict form, I don't think -- I don't think
9 that's standard and I worry that that invites them to sort of
10 think that there is -- there may be two different
11 conspiracies here or that they have to reach some --

12 THE COURT: It's certainly not -- it's certainly
13 very common in civil cases and rare in criminal cases to have
14 special verdict questions beyond just the -- that's my
15 experience, I agree with you. And I'm curious, I would have
16 actually thought that you would wouldn't have wanted that.

17 MR. WEINBERG: No, I think it focuses the jury. I
18 mean, there's a unanimity requirement here. And it focuses
19 the jury on which of the two they unanimously agreed on, or
20 both. And it's important, you know, for obvious reasons.

21 MR. FRANK: Judge, the only general comment that
22 I'd make in response to that is, you know, this is a
23 complicated case, but it is a standard securities fraud case.
24 And so anything we do that sort of deviates from the standard
25 way that securities fraud cases are treated, seems to me

1 unwarranted and potentially dangerous.

2 MR. WEINBERG: Here's the reason for it, so there's
3 no secret. If Mr. McLellan is convicted on Count 1 and
4 there's an appeal and I succeed in persuading the Court of
5 Appeals that it was extraterritoriality as to wire fraud, but
6 the security counts were proven, I think it's important -- I,
7 at least, want to make the request to give the Court of
8 Appeals some clarity as to which of the two objects they
9 agreed on, if the Government opposes it, then I think they're
10 at a disadvantage on an appellate basis.

11 THE COURT: Right. I thought it would be something
12 like that. So you're saying that if -- let's say if you were
13 convicted and if he appeals and you succeed on appeal in
14 establishing an extraterritorial aspect to the wire fraud, so
15 that would -- then the question would be what to do about --
16 you're saying if it was just a general verdict, we wouldn't
17 know whether they --

18 Assuming he was found guilty of everything, we
19 wouldn't know whether -- or even if he wasn't, I suppose,
20 even if he weren't found guilty of securities fraud, either
21 way, we wouldn't know whether the jury thought that he was
22 also guilty of the securities fraud. And so that would be an
23 independent basis to leave the conspiracy standing and it
24 would be -- or would it be -- I see. That's why you want it.

25 MR. WEINBERG: Yes. I want some clarity. In other

1 words, if the jury was to say --

2 THE COURT: In other words, if they said only wire
3 fraud and you prevailed on that.

4 MR. WEINBERG: Then I get an acquittal. If I
5 succeed, obviously --

6 THE COURT: On the other -- right.

7 MR. WEINBERG: -- on predicate of proving
8 extraterritoriality.

9 THE COURT: Right.

10 MR. FRANK: Again, we don't normally peek behind
11 the curtain of what the jury is thinking, but I will also say
12 that, in this case, in the context of what was charged, we
13 would have an indication, because there are separate
14 substantive counts of securities fraud and wire fraud.

15 THE COURT: Although conceivably, it wouldn't be --
16 I don't think I would -- I'm just thinking out loud, but if
17 the jury came back and said conspiracy, but didn't convict on
18 any of the substantive wire fraud -- the Counts 2 to 5, but
19 convicted on Count 1, I don't think that would be an
20 inconsistent verdict.

21 MR. FRANK: It would not. But that's standard in
22 every case where there's a multiple object conspiracy charged
23 and where defense -- the fact that the defendant is making a
24 *Morrison* argument doesn't change that. There are always
25 arguments about why a --

1 THE COURT: So let me think about it. I'll tell
2 you what I'm thinking about. On the one hand, I think
3 there's a value to trying to -- there's a clarity value, but
4 there's a preference for general questions and I understand
5 you essentially saying the reason you want the clarity -- the
6 reason clarity trumps generality, even though the preference
7 is for generality, is because there is this issue and it
8 would resolve the clarity, it would -- if you prevailed on
9 appeal, everything would be known and that would settle it
10 all out. And so let me -- I'll think about that. I'm just
11 not sure.

12 MR. WEINBERG: Next, on 24, Your Honor instructs
13 that Mr. McLellan, you know, be found not to be part of the
14 agreement at the start, he could still be found guilty if he
15 willfully joined the agreement later.

16 We've asked, in our request, for what I call a
17 *Grunewald* instruction, we raised it pretrial as an evidence
18 matter. There is no instruction here that would provide the
19 jury with any guidance as to whether, if they found -- and
20 it's certainly conceivable on the basis of this record, they
21 will find that Mr. McLellan was not part of a conspiracy on
22 February and March, or in 2010, to defraud these clients in
23 terms of the selection of transition managers or securities
24 trading, but found that he joined the conspiracy in June and
25 then in August, when he helped Mr. Pennings cover it up, to

1 use the Government's language.

2 THE COURT: Right.

3 MR. GOLDSTEIN: But that would not necessarily
4 provide a principled predicate, I would contend, for his
5 having been found guilty of conspiracy's charge. Because I
6 don't believe there's any evidence that amongst the original
7 agreement is that we would rebate a million dollars to Royal
8 Mail if they complained. Yet, that is a substantive charge
9 against Mr. McLellan for wire fraud. And a jury could, on
10 this record -- I'm not saying they would, but could on this
11 record say that's when Mr. McLellan became part of the
12 conspiracy, on June 21 and June 22, when, instead of blowing
13 the whistle on Pennings --

14 THE COURT: But if the overt act, if the conspiracy
15 preexisted him, and if an overt act had been committed and
16 then he willfully joined --

17 MR. WEINBERG: If concealment -- if lying to a
18 client about what happened six months earlier --

19 THE COURT: If lying to a client about lying to a
20 client.

21 MR. WEINBERG: -- was part of the original
22 agreement, then, yes, the *Grunewald* standard would be met.
23 But if that wasn't part of --

24 THE COURT: What are you telling me you want me to
25 say here?

1 MR. WEINBERG: I want you to give an instruction
2 consistent with our request that I believe is request 22, on
3 page 32 of our principal request document. Just essentially
4 just drafted along the lines of the Grunewald test.

5 MR. FRANK: Just a factual point. Even if what
6 Mr. Weinberg says is true, that e-mail, inadvertent
7 commissions applied, served not only to cover up the taking
8 of -- to continue to conceal the other part they were doing,
9 but it was also to keep the \$2 million that they had obtained
10 by fraud. So even if, contrary to fact, Mr. McLellan had not
11 been involved in the original scheme, once he was involved in
12 concealing from the client and keeping the \$2 million that
13 had been fraudulently obtained, he's guilty of a conspiracy
14 to commit wire fraud and securities fraud.

15 MR. WEINBERG: And that's where the disagreement
16 occurs. I mean, take a bank robbery, if a person did not
17 conspire to rob a bank, but four months later the robber
18 comes to him and says, hey, the police may search my home,
19 they're on to me. They think I robbed the bank. Will you
20 help me --

21 THE COURT: I got it. I don't think I'm going to
22 change the instruction, but I'll reread -- I'll go back and
23 look at that instruction you have before I conclusively
24 decide.

25 MR. WEINBERG: And it's not that I'm requesting

1 necessarily that it be on page 24. I'm requesting that
2 request 22 be considered and adopted.

3 THE COURT: Right.

4 MR. WEINBERG: Next is on page 25, this is the
5 start of the omissions -- the references to omissions, down
6 in -- under 10b-5, subsection (b), and it kind of permeates
7 the next five pages, and I just want the Court to understand
8 -- I know the Court does understand our position that we
9 believe the Government structured this case as an affirmative
10 misrepresentation case. I think this goes to page 26, 27 --
11 all of the different instructions where Your Honor gives the
12 jury alternatives to an affirmative misrepresentation theory,
13 we object to.

14 We understand that it's within the language of
15 10b-5, but it's simply inconsistent with what the Government
16 has put this case on, which is they've said it's an
17 affirmative misrepresentation case and I think the net effect
18 of these instructions is to dilute that burden and to allow
19 the jury to find that Mr. McLellan -- or Mr. McLellan caused
20 Mr. Pennings not to say something that would give the client
21 more information that the client could have then had an
22 understanding that there was not only going to be a
23 transition management fee, but also broker-dealer charges.
24 And that's one of the essential battlegrounds, factually.

25 And I think upon this record -- and I appreciate

1 the Court's single instruction about no duty to disclose, but
2 by repeatedly giving them the options of concealment and
3 omissions and failed to make a statement that would have made
4 the statement they made less misleading, I think Your Honor
5 has essentially prejudicially broadened the basis of criminal
6 liability beyond a theory that Mr. McLellan was prosecuted
7 on.

8 THE COURT: Okay. I don't -- you don't agree with
9 that, right?

10 MR. FRANK: We do not.

11 THE COURT: That general objection is overruled. I
12 think that the -- their Government is proceeding on an
13 affirmative misrepresentation theory, but those affirmative
14 misrepresentations could be characterized in a number of
15 different ways, all of which are expressed within the law
16 here. And I don't think that a reasonable -- I don't think
17 jurors would be confused into thinking that failing to say
18 something, in and of itself, would give rise to liability,
19 absent it -- need to say something because of another
20 misrepresentation or affirmative statement that had been
21 made -- and the intent is clear with respect to the
22 statement. So as a general matter, it's overruled.

23 What's next?

24 MR. WEINBERG: Page 26.

25 THE COURT: Yes.

1 MR. WEINBERG: The middle, that Mr. McLellan did at
2 least one of the following, either engaged in a scheme to
3 defraud, a fraud or deceit, or made an untrue statement of a
4 material fact. I believe that the untrue statement of
5 material fact needs to be in connection with a scheme to
6 defraud. You can't just have an isolated misstatement of
7 material fact. It needs to be part of an overridden
8 fraudulent scheme to defraud. So I think by giving them
9 three separate standalone, independent bases that --

10 THE COURT: Well, if he made an untrue statement of
11 material fact and he made it willfully, knowingly, and with
12 intent to defraud, and that he -- then why wouldn't that be
13 enough, with the third prong, with the jurisdictional prong.

14 MR. WEINBERG: Because Your Honor says, with
15 respect to the first element, it is not necessary to
16 establish all of the different types --

17 THE COURT: You have to establish one, two, or
18 three.

19 MR. WEINBERG: Right.

20 THE COURT: But isn't that just a correct statement
21 of the law?

22 MR. WEINBERG: It is a statement -- it's probably a
23 correct statement of the law, regrettably. But on the basis
24 of this case, you know, you have the real risk of a statement
25 being taken, you know, out of the fraudulent scheme alleged,

1 which is a scheme to lie to clients. It just allows the jury
2 to adopt a statement that's --

3 THE COURT: I don't -- I understand the point and
4 the worry, but I'm not persuaded, because it's expressly
5 required that -- that he had to act -- the act then, in that
6 circumstance, would be the untrue statement and he would have
7 had to have acted with the intent to defraud. So --

8 MR. WEINBERG: And page 27, Your Honor.

9 THE COURT: Yes.

10 MR. WEINBERG: Which is the in-connection
11 instruction.

12 THE COURT: Yes.

13 MR. WEINBERG: We believe and we've made certain
14 requests to Your Honor, you know, that the in-connection
15 needs to be in connection with the sale or purchase of a
16 security and not simply a broad in-connection to an
17 investment decision or something that coincided with a
18 securities transaction. You know, there's several places
19 where the Court, even once you invite a false statement in
20 connection with a selection of a transition manager.

21 And so we would ask the Court to go back and give
22 our request for instruction on this issue, which is number 3,
23 that the statements need to relate directly to an investor's
24 decision to buy or sell a security, in order to be
25 in-connection, as required by the securities law.

1 THE COURT: Noted and overruled.

2 Next.

3 MR. WEINBERG: Next is --

4 THE COURT: I'm assuming on any of these, if you
5 want me to say what he's asking for, or something similar,
6 you're going to stand up and tell me?

7 MR. FRANK: Yes, Your Honor.

8 MR. WEINBERG: 27 top.

9 THE COURT: I'm sorry. What page?

10 MR. WEINBERG: 27, on the top three lines, Your
11 Honor.

12 THE COURT: Yes.

13 MR. WEINBERG: I understand it's not an essential
14 element that Mr. McLellan profited or received a benefit, but
15 I'd ask the Court not to say it doesn't matter. In other
16 words, if the Court can say there it is not an essential
17 element as to whether the alleged unlawful scheme was
18 successful or if Mr. McLellan profited, but one of our
19 arguments factually, is it does matter that he had no
20 benefit, you know, as a motive argument. And so I would ask
21 the Court to revise that instruction.

22 MR. FRANK: We think that's a correct statement of
23 the law, Your Honor, motive is not an element and so it
24 doesn't matter.

25 MR. WEINBERG: I'm not asking that it be an

1 element. I'm just asking that it not be excluded as a
2 relevant consideration.

3 THE COURT: What are you asking for, again?

4 MR. WEINBERG: It is not an essential element in
5 connection to this case, whether the alleged unlawful scheme
6 was successful or whether Mr. McLellan profited or received
7 any benefits as a result of it.

8 MR. FRANK: It's not only not an essential element,
9 it's not any kind of an element and motive is irrelevant.

10 MR. WEINBERG: In fact, Your Honor can flip the
11 sentences and say success is not an element of the crime
12 charged, without the first sentence. It's an optional way.

13 THE COURT: In other words, you're saying just
14 delete the first sentence?

15 MR. WEINBERG: Yes.

16 MR. FRANK: We wouldn't object to flipping the
17 sentences, but we think that the --

18 THE COURT: What if I said neither success, profit,
19 nor benefit are elements of the crimes charged?

20 MR. FRANK: That's fine.

21 MR. WEINBERG: That's fine.

22 THE COURT: Okay. Next.

23 MR. WEINBERG: Page 27, again, at the -- four and
24 five lines up at the bottom is the omissions theory that
25 we've made clear our --

1 THE COURT: You've noted your objections,
2 preserved. It's over.

3 MR. WEINBERG: Okay. Then I'm not going to.

4 Next is we object to the reckless indifference
5 alternative. A statement, claim, or document is fraudulent
6 if it was falsed, or if it was made with reckless
7 indifference. I think that dilutes the requirement of
8 falsity.

9 THE COURT: Overruled.

10 MR. WEINBERG: Page 28, there's a reference about
11 just halfway, five lines down, in the third paragraph or the
12 second paragraph, that begins on that about a fact is
13 material if there's a substantial likelihood or reasonable
14 investor would consider it important in an investment
15 decision. We would ask that the purchase or sale of a
16 security --

17 THE COURT: The fact is material -- you mean add to
18 it an investment -- say it again. What do you want me to
19 add?

20 MR. WEINBERG: Instead of investment decision,
21 which could be which broker do I choose, or how much do I pay
22 at a premium.

23 THE COURT: You want to say -- instead of "when
24 making an investment decision," you want to say when
25 making --

1 MR. WEINBERG: A preponderance or sale of a
2 security.

3 MR. FRANK: We object to that, Your Honor.

4 THE COURT: I think I'm going to leave it the way
5 it is. Overruled.

6 MR. WEINBERG: We -- the next line, "statement
7 contains a material fact, if there's a likelihood an investor
8 engaging a transition manager would consider it significantly
9 altering the mix of information." I think this goes beyond
10 what securities fraud criminalizes. It's more in the nature
11 of a wire fraud that the selection of a broker, an investment
12 manager, a transition manager is simply outside the confines
13 of Title 15, which deals with the purchase and sale of
14 securities. That's why I would object to that sentence.

15 THE COURT: What do you think about that?

16 MR. FRANK: I think there's specific case law
17 addressing this point, which we've previously cited which
18 says exactly what, essentially, is here.

19 THE COURT: Overruled.

20 MR. WEINBERG: We've given Your Honor the specific
21 requests, requests 4 and 5, in terms of what we think is the
22 appropriate law. We've cited to cases that --

23 THE COURT: I'll look -- it's overruled, but I'll
24 look at 4 and 5, and if I think differently again, then
25 I'll --

1 MR. WEINBERG: Thank you, Your Honor.

2 Page 28, again, "You may consider the testimony of
3 a victim as evidence."

4 We would ask that that sentence be struck. That it
5 be instead replaced by the test of materiality as the
6 objective reasonable man test. And really, it also deals
7 with the sophistication of the investor. We've given Your
8 Honor request number 6 on the reasonable investor. But I
9 think this gives too much weight to a victim testimony that
10 easily gets converted into the objective reasonable investor.

11 THE COURT: Well, I thought -- the reason I added
12 the sentence was I thought -- it's helpful, because one could
13 easily think that the testimony of a victim means that it is
14 material, if a victim says it mattered to me. It seems to me
15 it's evidence of what a reasonable investor would mean.

16 But I mean, a juror could look at a victim and say
17 I believe you, that it mattered to you, but it -- I don't
18 accept that -- and that's a piece of evidence to consider, as
19 to what matters to a reasonable investor, but I think it
20 doesn't matter to a reasonable investor. And so your
21 credible, believable, sincere testimony that I credit isn't
22 enough. So I thought I should -- that's why I thought I
23 should explain it to them, in what way they should view it.
24 And that's why I said hypothetical reasonable investor.

25 MR. WEINBERG: I think an affirmative instruction,

1 saying that the test is not -- that the view of a specific
2 victim, but instead, from the standard of a reasonable
3 investor. And in this case, a reasonable, sophisticated
4 investor, sends them the right message in terms of what
5 materiality means.

6 MR. FRANK: Actually, that, I think, would
7 discredit the testimony of the individual victims in this
8 case and suggest that individual victims should not be
9 considered as reasonable investors.

10 THE COURT: What if I added to the last sentence,
11 the sentence we've been talking about, something like -- I
12 don't know. Scratch that.

13 MR. FRANK: We think this is an uncontroversial
14 proposition, Your Honor. They may consider it, they may not
15 consider it. But particularly in this case, where there were
16 multiple --

17 THE COURT: I don't have any problem with the
18 sentence, I think it's correct. The only question that was
19 ruminating in my mind is whether I should try to signal to
20 them that it's not dispositive, but I'm trying not to say
21 anything that would say that -- ignore it. So I think this
22 is accurate and fair and explains to them how to understand
23 the testimony that came that -- and focuses them, this plus
24 the couple of sentences before, focuses them in the idea that
25 it's not a victim-centered subjective test. It's an

1 objective hypothetical reasonable investor under the
2 circumstances test.

3 MR. FRANK: Yeah, and I think that's explicit in
4 what's said here.

5 THE COURT: I note your objection and it's
6 overruled.

7 MR. WEINBERG: Thank you, Judge.

8 And the next one is page 31.

9 THE COURT: Yes.

10 MR. WEINBERG: This is the instrumentalities of
11 the -- and I think that it needs to be more than related to
12 the -- you know, bear some relation to the object of the
13 scheme. This is the last sentence on the second to last
14 paragraph. It needs to be in furtherance of the object of
15 the alleged scheme.

16 THE COURT: The actual wire?

17 MR. WEINBERG: Yes, that's what we would contend,
18 Your Honor.

19 THE COURT: So this is the sentence that says -- so
20 we're just all looking at the same thing, "All that is
21 required is that the use of any instrumentality of interstate
22 commerce bears some relation to the object of the scheme or
23 fraudulent conduct."

24 You say it should say "furtheres the object of the
25 scheme or fraudulent conduct."

1 MR. WEINBERG: Let me refer the Court to the case
2 of *US vs. Tavares*, which was the probation officer case that
3 was tried by Judge Young, reversed by the First Circuit. I
4 argued it and I argued for furtherance. And my memory is --
5 I was planning on rereading it this morning, but I think Your
6 Honor can refer to that case as setting the proper test
7 for -- that was a mail fraud case, but I think the test is
8 the same in terms of what is the nexus between the scheme and
9 the particular wire e-mail.

10 THE COURT: All right. I'll look at that case.

11 MR. FRANK: Yeah, I don't think that's relevant,
12 Judge, since this is a securities fraud case. I will note
13 that at the top of the page, the Court already says that the
14 use of a facility of a securities exchange needs to be in
15 furtherance of the scheme to defraud.

16 Without doing some additional research, I'm
17 actually not sure that that's even correct.

18 THE COURT: For the moment, I'm leaving it all the
19 way it is. I will read *Tavares*, but your point with respect
20 to *Tavares*, Mr. Frank, is the standard for the connection,
21 the nexus with respect to securities fraud is not established
22 by the nexus for wire fraud. The general mail or wire fraud
23 statute.

24 MR. FRANK: Correct. And I'm actually not even
25 sure -- and I can do some additional research on this,

1 whether the statement at the top of page 31, that the use of
2 a facility of a securities exchange needs to be in
3 furtherance of the scheme is correct. If Your Honor looks at
4 page 25 -- I'm not saying it's not correct, I just don't
5 know. But page 25 provides, in the code itself, that it
6 shall be unlawful for any person, by the use of any means or
7 instrumentality of interstate's commerce, and then it
8 provides the rest of the statute. It doesn't say anything
9 about in furtherance there.

10 THE COURT: For the moment, I'm leaving -- the top
11 of page -- I'm leaving page 25 exactly as it is, because at
12 some point, finality is important. You didn't object to it.
13 I'm not changing the -- what page number? 25?

14 MR. WEINBERG: Got it. Wire fraud --

15 THE COURT: I'm sorry, we're on 20 -- 32.

16 MR. WEINBERG: 32, we addressed the
17 extraterritoriality request that we've made.

18 THE COURT: Right.

19 MR. WEINBERG: Page 33, the wire fraud element 2,
20 we object to knowing concealment.

21 THE COURT: I see. I'm sorry. Page 33?

22 MR. WEINBERG: 33, the element 2, it's in
23 connection to the -- the requests as to securities fraud. We
24 also object to the -- any omissions theory, concealment
25 theory.

1 THE COURT: What's your view?

2 MR. FRANK: Your Honor, knowingly concealing
3 something is plainly an affirmative misstatement, if you're
4 doing it with the intent to mislead.

5 THE COURT: I'm going to leave it the way it is,
6 overruled.

7 MR. WEINBERG: 33, the Court has, I presume
8 deliberately, but I would ask the Court to reconsider the
9 omission of an extraterritoriality instruction. We've made
10 one in our requests. That would be request number 18. I'd
11 ask the Court to reconsider the necessity for that
12 instruction as to wire fraud. Your Honor gave it to
13 securities fraud, although not in the exact fashion I
14 requested.

15 THE COURT: Overruled. But I'll look -- I'll look
16 back at 18 and think about it.

17 MR. WEINBERG: Thank you, sir.

18 Page 34, again, the reckless indifference option,
19 three lines up from the bottom, we object to.

20 THE COURT: Overruled.

21 MR. WEINBERG: Page 36 is, again, the wire and
22 whether it needs to be in furtherance, rather than related
23 to.

24 THE COURT: Let me just find the right spot.

25 MR. FRANK: Where is that, Marty?

1 THE COURT: The second -- first -- the paragraph
2 that begins "wire communications and interstate," are you
3 referring to the sentence, "The wire communication does not,
4 itself, have to be essential to the scheme, but must have
5 been made for the purpose of carrying out the scheme."

6 MR. WEINBERG: Yes.

7 THE COURT: That's where *Tavares* would --

8 MR. WEINBERG: Yes.

9 THE COURT: I'll look at *Tavares*.

10 MR. WEINBERG: Okay.

11 THE COURT: Your Honor has it, in terms of the
12 bottom of page 36, where Your Honor charges on Count 5, this
13 would be the place we would ask the Court to consider the
14 Grunewald instruction.

15 THE COURT: Remind me of the Grunewald.

16 MR. WEINBERG: Page 38, which is the AXA charge, we
17 would ask the Court to charge that the jury must find that
18 the scheme to defraud was in existence at the time of the
19 wire that is charged, meaning February 24th.

20 MR. FRANK: Judge, that's implicit in saying that
21 the wire has to be in furtherance of the scheme. It's not
22 only implicit, it's explicit.

23 MR. WEINBERG: I'd say it's implicit, but not yet
24 explicit. So we'd ask the Court to consider making it
25 explicit.

1 Just two more.

2 THE COURT: Hold on. So you would want me to say
3 that --

4 MR. WEINBERG: There was a scheme to defraud first
5 and then it was in existence at the time of -- on or about
6 February 24, 2011.

7 MR. FRANK: We object to that, Your Honor. It
8 says, first, they have to find there was a scheme to defraud,
9 and fourth, they have to find that for the purpose of
10 executing the scheme, or in furtherance thereof, there was a
11 wire.

12 MR. GOLDSTEIN: Or it caused the specific wire on
13 February 24th, in paragraph 4, would satisfy the need. We're
14 concerned about a wire that proceeded the scheme to defraud
15 and the jury not having -- not having an explicit -- that if
16 they find the scheme to defraud, they need to find that it
17 was in existence at the time of the wire.

18 MR. FRANK: Yeah, that's something that he can
19 argue, but we think the instruction --

20 MR. WEINBERG: It's an element.

21 MR. FRANK: And it's here.

22 MR. WEINBERG: Implicit. We ask for it to be
23 explicit.

24 MR. FRANK: It is explicit. There was a scheme to
25 defraud and for the purpose of executing that scheme, this

1 wire was sent.

2 THE COURT: I understand. Let me think about that.

3 MR. WEINBERG: Two more aiding and abetting, I
4 think the Court needs to add an affirmative element to the
5 aiding and betting instruction.

6 THE COURT: Explain. What do you want me to say?

7 MR. WEINBERG: Number one -- let me go to my
8 request.

9 That Mr. McLellan took an affirmative act to help
10 or cause a wire fraud to be committed.

11 MR. FRANK: The instruction says that, Your Honor,
12 the end of the second.

13 THE COURT: Took part in the criminal endeavor,
14 seeking to make it succeed?

15 MR. FRANK: Yes.

16 MR. WEINBERG: He can passively have participated.

17 THE COURT: By undertaking some affirmative act?

18 MR. WEINBERG: Yes. By taking some affirmative
19 act.

20 MR. FRANK: It's just not a standard instruction.

21 MR. WEINBERG: Here, I disagree. I think that
22 affirmative act has always been a part of the elements of an
23 aiding and abetting instruction. Otherwise, it becomes a
24 passive sharing of intent.

25 THE COURT: I'll think about that. I'll look back

1 and look at that.

2 MR. WEINBERG: And lastly, we ask the Court to
3 consider an adverse inference instruction regarding the
4 witnesses not called and the documents not produced. They
5 were exclusively within the control of the Government through
6 MLAT, they chose not to use MLAT. You know, we had no
7 ability to produce the witnesses, no ability to produce the
8 documents, and I think it's an absolutely paradigm for an
9 adverse inference instruction.

10 MR. FRANK: Your Honor, an MLAT cannot be used to
11 compel testimony.

12 THE COURT: I'll tell you what I'm going to do
13 about that. I haven't included it. I don't think an adverse
14 instruction -- ordinarily, when one thinks of adverse
15 instructions, one thinks of an adverse instruction arising
16 out of like a spoliation adverse instruction, because the
17 other side spoliated documents or something. And I don't
18 think that's -- that kind of adverse instruction is
19 applicable here.

20 The -- the inability to subpoena witnesses from
21 overseas is an outgrowth of the nature of the facts giving
22 rise to this indictment and the law and the jurisdictional
23 boundaries, and the like, rather than some other kind of act.
24 Whether I should say anything at all about that -- I haven't
25 so far in the draft, but let me think about that, and if I

1 were to do that, I would do something and I would then want
2 to talk to all of you again, before I was done, because it's
3 an unusual kind of circumstance, and it would be, you know, a
4 different kind of instruction. And so I would do it, you'd
5 get it, and I would -- if I included something like that, or
6 were thinking about it, I would want to talk to you about it
7 again before -- to give you all a chance to address it and
8 talk about it, I think, would be only fair. I don't know
9 that I'm going to do that, but I'm -- will puzzle over that.

10 MR. FRANK: We think, just to be clear, that would
11 be a big mistake, particularly where counsel made an
12 affirmative decision not even to introduce the depositions
13 that he so forcefully argued he should be able to introduce.
14 He withdrew that.

15 So to then say I made a decision not to introduce
16 any of their testimony, because it wasn't everything I wanted
17 and then to get an instruction that he was unable to get
18 their testimony is misleading and extremely prejudicial to
19 the Government.

20 MR. WEINBERG: I would just answer, we made Rule 15
21 motions, the Government opposed them, only through the
22 assistance of the Government could we have gotten the
23 witnesses and gotten the documents. We tried very hard. Mr.
24 Frank chose not to exercise his powers.

25 THE COURT: Just so you're all clear, the only

1 thing -- I'm not saying I'm going to do this, but it's -- the
2 only thing I'm thinking about is that it's -- it is a fact
3 that there are relevant witnesses to this case who are not
4 United States citizens and who work and reside outside the
5 subpoena power of the Court. There's no dispute about that.

6 Based upon the rulings that I've made -- I don't
7 know that I'm right -- I thought it was right and that's why
8 I did it, but the Court of Appeals potentially will
9 ultimately decide, but based on the rules that I made,
10 whatever powers exist under the MLAT treaties are not
11 available to the defendant. And that's not -- I don't view
12 any of this as like a -- to sort of analogize to spoliation,
13 I don't view any of this as like a spoliation kind of thing,
14 where the Government didn't do something it should have done.
15 This is just, you know, an outgrowth of the nature of this
16 charge. Not the nature of the charge itself, but the facts
17 out of which it grows, that there are witnesses overseas and
18 you could imagine that happening in other cases, too.

19 Whether I should say anything -- so far I haven't
20 thought I should say anything about it. That's why there's
21 nothing in here, but whether there's anything to be said
22 about that, and then if I were to say, what would I say and
23 how would I balance it in light of those depositions or any
24 other issues that I would have to think about. And given
25 that, it would be -- it's not -- it would --

1 I'm not aware of any instruction to which I could
2 look for guidance and nor am I particularly aware of other
3 cases that have arisen in which there's a large number of
4 foreign witnesses, where this kind of issue might have
5 arisen. I have to -- if I were to add something like this,
6 that's why you would see it in what I issued, but I'd also --
7 you'd see that I would want to talk to you again. Because I
8 think it would be only fair.

9 If I don't do it, you've made your arguments.
10 They're overruled if I don't do and I don't think there's
11 anything more to discuss. On the other hand, if I think
12 there is something -- if I think there is something I should
13 say about it, then I think that you're both entitled to
14 address both whether the Government, whether I should say it.
15 I don't think there's any point to hearing about it now. I
16 understand your position generally. And also you'd both be
17 entitled to address what I should say.

18 In other words, you could look at what I crafted
19 and you might -- we could preserve our objections, and I
20 shouldn't say more, I shouldn't say anything, but you might
21 say, given whatever I'm doing, you should just put it this
22 way or that way and I would want to hear your input on that.
23 So that's I think where I'd leave that.

24 MR. WEINBERG: Just so my silence is not
25 misinterpreted, I don't agree with Mr. Frank that the

1 Government is powerless under its treaties to get foreign
2 witnesses to testify.

3 THE COURT: I'm sorry, say that again?

4 MR. WEINBERG: I don't believe the Government is
5 powerless under its various treaties to get witnesses to
6 testify.

7 MR. FRANK: And just one or two sentences, Judge.
8 That opens up a whole can of worms. First of all, it is
9 contrary to existing instructions. No court invites a jury
10 to speculate as to what other evidence might be out there.

11 THE COURT: That's the problem.

12 MR. FRANK: And we think that would be a problem.

13 THE COURT: A problem.

14 MR. FRANK: But more importantly, the implication
15 that we have this power or this evidence exists, invites all
16 sorts of other --

17 THE COURT: I'm not -- I think you misunderstand.
18 I'm not suggesting that the -- in the ordinary course, we
19 don't advise the jury that the defendant has the power to --
20 has the ability to invoke the Court's subpoena power to call
21 in other witnesses. It's just sort of presumed that they
22 decide the case based on the evidence and we all operate
23 under the assumption that if there were other relevant
24 evidence that were available, it would be here, because both
25 of you possess the ability to invoke the Court's nationwide

1 subpoena power and that ordinarily encompasses anybody or
2 anything that might be relevant.

3 Here, the -- it's a little bit different. How to
4 deal with that, whether I should deal with that -- I should
5 say this. Whether I should deal with that in the
6 instruction, I haven't so far thought I should, I want to
7 think about it. I don't view it as an -- it's a -- I don't
8 know what I would say about it. I have to think about it,
9 because I don't know that they could -- what you would infer
10 as to what it means, so I don't know what I would be
11 instructing them about.

12 MR. WEINBERG: But adverse inference instructions
13 don't require -- are not limited to spoliation or to bad
14 faith. They're an evaluation of the respective interests and
15 powers of the two parties.

16 THE COURT: So I don't know what I would say about
17 it and that's why, if I do say something, because it is
18 different and I can't think of a case to look to for guidance
19 about this, I would want -- if I did say something about it,
20 I would give you all an opportunity to be heard again about
21 it, whereas all the rest of these issues, I'm just going to
22 take it under advisement, resolve them, and you can make your
23 objections after I deliver the instructions, but I wouldn't
24 need to hear you again about it.

25 MR. FRANK: One final point on that, Your Honor.

1 These -- at least two witnesses were available to the defense
2 had the defense sought their testimony in a timely manner.

3 So --

4 THE COURT: My concern is not with respect to
5 testimony of people who testified. The issue that's
6 presented here is simply this: In every other criminal
7 case -- well, in every criminal case, including this one, the
8 defendant can invoke the Court's subpoena power. In every
9 other -- maybe not every other criminal case ever prosecuted,
10 but in most criminal cases, anybody who anybody would want is
11 within the confines of the United States and subject to the
12 subpoena power, and so they can have the person.

13 Here, there are people who were involved in these
14 things, who certainly might have information that's relevant
15 to the case, whether they would actually be useful witnesses
16 in the matter, and there's a whole lot of other things, but
17 they would be -- aren't subject to the subpoena power.
18 That's different. And so I don't know that there's anything
19 to say about it, but that is different.

20 MR. FRANK: Except that two of those people were
21 actually subject to letters rogatory and it did compel their
22 testimony, and the subsequent letters rogatory were only
23 issued in such a way -- were only sought at a time when even
24 had they been issued, it's highly unlikely their testimony
25 would have been compelled in time for trial.

1 MR. WEINBERG: I don't agree. We sought their
2 criminal testimony on February 15th, I believe, which is a
3 week after their depositions. All of the --

4 THE COURT: But do the -- putting aside timing, do
5 the letters rogatory provide an ability compel their -- to
6 come here to testify in this proceeding.

7 MR. WEINBERG: No. It was a process through the UK
8 courts that did not require their physically coming here.
9 What it did is --

10 THE COURT: It could have led to you being able to
11 take their deposition for this case there.

12 MR. WEINBERG: Had I moved for a letters -- for a
13 Rule 15 and letters rogatory here, rather than before Judge
14 Woodlock, at a time when I moved for it in front of Judge
15 Woodlock, then I could have taken a letters rogatory
16 deposition there. I didn't believe I had the basis to argue
17 that I needed their testimony --

18 THE COURT: So in that sense, people who have
19 information, there's -- the letters rogatory, the way you
20 could do it is getting my permission for a deposition in the
21 criminal case.

22 MR. WEINBERG: Right. And we sought that, Your
23 Honor.

24 THE COURT: Right. And the letters rogatory and
25 sufficient time to go there and get their testimony compelled

1 there, pursuant to the letters rogatory, and then go there,
2 take their deposition.

3 MR. WEINBERG: And in two respects. One is Your
4 Honor allowed a Rule 15 regarding Sarah Lewis, but the
5 Court's wouldn't enforce it without the assistance of the
6 Government. And two, in terms of Ms. Paul and Ms. Beck,
7 their depositions -- the civil depositions, Mr. Frank opposed
8 their admission. I didn't ultimately move for them, they
9 were truncated. They were subject to specific UK procedures
10 that limited them.

11 But most importantly, I moved a week after
12 February 7th, when I took them, for a Rule 15, and we had
13 every possibility, I can't say certainty, because they were
14 represented by Freshfields. That was the State Street's
15 external counsel in UK. There were an enormous amount of
16 negotiations that led to the civil depositions. But a lot of
17 the procedural obstacles, you know, had been resolved in the
18 capacity of the SEC deposition. It was not impossible that
19 they would have been required by UK law to sit for criminal
20 law depositions, had Mr. Frank not opposed the granting of
21 those two Rule 15s, when they were timely made within a week
22 of the SEC depositions.

23 MR. FRANK: But that's precisely my point, Your
24 Honor. This is all hypothetical. What is clear is that --

25 THE COURT: I'll think about it. I got it.

1 All right. I'll take it under advisement. I'll
2 issue a revised jury instruction and verdict form on ECF so
3 you'll have it. We'll start at 9:00 Monday, so maybe let's
4 meet at quarter to 9:00, just to iron out any logistical
5 issues.

6 To the extent you all have issues about whatever
7 demonstratives you choose to use in your closing arguments,
8 you should talk to each other and resolve them if you can.
9 And if you can't, if they're just really quick, we'll meet at
10 a quarter of 9:00, and if for some reason you think that it's
11 going to be a more extended discussion, or what have you,
12 then what you should do is either file something on ECF that
13 requests that we meet earlier and you can assume -- something
14 that tells me or -- you know how to electronically
15 communicate, do it directly, because Ms. Simeone might not
16 be -- is not obligated to check her e-mail over the weekend.
17 So let me know if there's some reason that you needed to meet
18 earlier. Otherwise, I would think 8:45 would be more than
19 fine.

20 MR. FRANK: And on the timing, Your Honor. So we
21 anticipate our closing being an hour, maybe an hour and a
22 couple of minutes and we anticipate rebuttal of about 15
23 minutes, assuming that's all okay with the Court.

24 MR. WEINBERG: I'm less interested in sticking to
25 one minute or two minutes, just hoping the rebuttal is

1 rebuttal and not a second summation, which is one of the
2 disadvantages of a system where I get to argue in the middle
3 of two prosecutors.

4 MR. FRANK: It will be rebuttal, Your Honor.

5 THE COURT: So the overall amount of time I don't
6 have a problem with. It should just be rebuttal. 15 might
7 be a lot of rebuttal.

8 MR. FRANK: I'm not sure that I need 15, Your
9 Honor, but I'd like to -- he has an hour and 15 minutes.

10 THE COURT: Right. I understand.

11 MR. FRANK: I generally gave a short --

12 THE COURT: I think the key to me, the thing that
13 is relevant on the rebuttal and what concerns me when the
14 time gets long, is the longer it is, it seems less like
15 rebuttal and more like another argument and it should be
16 rebuttal. So but in terms of the amount of time you're
17 talking about, generally that all seems fine.

18 And I want to think about it a little bit and I
19 will talk to you about it Monday morning, just sort of how
20 we'll structure breaks for them. I don't think it's
21 reasonable to expect them to sit through all of the argument,
22 argument, rebuttal, instructions without taking a break. And
23 so -- but I'm not going to break in the middle of anybody's
24 argument, obviously.

25 MR. FRANK: And just so the Court's clear, I'm

1 delivering the rebuttal. I favor very short rebuttals, but
2 it's a very complex case. I don't know what all arguments
3 are going to be made. So I don't want to foreclose myself.

4 THE COURT: I understand. I'm not trying to -- I
5 like it well presented to the jury. It's been well presented
6 so far. So that's just a general consideration.

7 So you're going to do rebuttal, and Mr. Johnston,
8 you're going to do the close?

9 MR. JOHNSTON: Yes, Your Honor.

10 THE COURT: Wow, so you're acceding Mr. Frank. I
11 thought you were hell bent on establishing local dominance at
12 every turn.

13 MR. FRANK: It's taking every ounce of my
14 self-control, Your Honor, and a few extra ounces.

15 THE COURT: Well, Mr. Johnston, you've inspired a
16 lot of self-control in Mr. Frank.

17 MR. FRANK: Your Honor, I'll take that in the best
18 possible way.

19 THE COURT: All right. We're adjourned. Have a
20 nice weekend. See you Monday.

21 THE DEPUTY CLERK: All rise, this matter is
22 adjourned.

23 (Court in recess at 11:06 a.m.)
24
25

CERTIFICATE OF OFFICIAL REPORTER

I, Rachel M. Lopez, Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing pages are a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 8th day of July, 2018.

/s/ RACHEL M. LOPEZ

Rachel M. Lopez, CRR
Official Court Reporter